U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: December 11, 2001

BALCA Case No. 2001-INA-116
ETA Case No. P1997-CA-09060008

In the Matter of:

CHUBBY'S FOOD SERVICE,
Employer,

on behalf of

RAZA FARAHBKHIAN,
Alien.

Appearance: John M. Bernier, Esq.
Sacramento, California

Certifying Officer: Martin Rios
San Francisco, California

Before: Vittone, Burke and Wood
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Specialty Cook, Foreign Food.[1] The CO denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26.

[1] Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On May 23, 1996, Employer, Chubby's Food Service, filed an application for labor certification to enable the Alien, Raza Farahbkhian, to fill the position of "Specialty Cook, Foreign Food." (AF 16). The job requirement was two years of experience in the job offered. The job entailed the preparation and cooking of a variety of Persian foods, and the training of cooks and other kitchen personnel in preparing and cooking such dishes including kabob koobeedeh, khoresht gheymen, sabzee kabob, tah deeg, addassee and cheloe mahi.

The CO issued a Notice of Findings ("NOF") on November 9, 2000, proposing to deny certification. (AF 12). The CO found that the job requirement of two years of experience far exceeded the specific vocational preparation time for the occupation of short-order cook. While Employer contended that it needed to add Persian items to the menu to stay competitive, the CO noted that Employer had failed to provide any menus showing that these items were being served, or indeed, that as part of a 52-link franchise chain, the franchise agreement provided for the service of Persian food. Employer was advised that it could amend the restrictive requirement or justify the requirement based on business necessity. If Employer chose to prove business necessity, it was advised that it needed to demonstrate that the job requirement bore a reasonable relationship to the occupation in the context of its business and was essential to perform, in a reasonable manner, the job duties described.

By cover letter from Employer's counsel dated December 4, 2000, Employer submitted a rebuttal letter dated December 1, 2000. (AF 9-10). Therein, Employer argued that the position at issue was not that of a short-order cook, but that of a cook, specialty, foreign food, which did require two years of experience. With regard to the lack of any Persian food items on its menu, Employer stated that no such items were now being served, however, it was seeking the services of a cook experienced in preparing and cooking Persian style foods, and would provide those items as soon as such a cook was available. Employer argued that it was apparent that establishments serving foreign type foods were luring away many of its customers.

The CO issued a Final Determination ("FD") on February 7, 2001, denying certification. (AF 7). The CO found that Employer conceded that it was not presently serving Persian food, and that therefore, there was no present opening for a foreign food specialty cook. The CO pointed out that further evidence of this fact was Employer's failure to respond to the NOF request for evidence that it was permitted by the franchiser to serve items outside of the standard menu. The CO concluded that the two year requirement was unduly restrictive and non-compliant with the regulations.

On February 22, 2001, Employer requested review of the denial of the application for labor certification by the Board of Alien Labor Certification Appeals ("BALCA" or "Board") for review. (AF 1).

DISCUSSION

In the case *sub judice*, the CO found that the two year experience requirement was unduly restrictive and had not been justified by business necessity. In making this finding, the CO relied on the classification of the job as a short order cook. Employer, however, maintains that the job is properly classified as a position for a cook, specialty, foreign foods, for which the Dictionary of Occupational Title's Specific Vocational Preparation permits a two year experience requirement. Thus, the preliminary issue is the proper classification of the job.

In *Chams, Inc., d/b/a Dunkin' Donuts*, 1997-INA-40, 232 and 541 (Feb. 15, 2000)(*en banc*), the Board considered how a CO may challenge a job title and the employer's burden in proving that its job title is correct. The Board held:

> [T]he CO challenged the employers' classification of the position under the DOT, and the employer objected to the re-classification. It is well established ... that the DOT is a flexible document, and that it should not be applied mechanically. *Lev Timashpolsky*, 1995-INA-33 (Oct. 3, 1996); *Promex Corp.*, 1989-INA-331 (Sept. 12, 1990). Using the DOT as an "occupational guideline" is necessary as the DOT is unable to list every job opportunity within the United States. Thus, the DOT must be utilized in a fashion that supports the intent of the law, and provides a flexible framework which must then be analyzed "in the context of the nature of Employer's business and the duties of the job itself." *Trilectron Indus.*, 1990-INA-188 (Dec. 19, 1991). As a result, it has been held that the CO may challenge, *inter alia*, the employer's classification of a particular position. *Downey Orthopedic Medical Group*, 1987-INA-674 (Mar. 15, 1988) (*en banc*). Employer is then required to provide sufficient evidence to rebut the re-classification. *Theresa Vasquez*, 1997-INA-531 (July 9, 1998). The cases at bar present no basis for changing these precedents.

Employer's rebuttal to the CO's classification of the job was that it had determined to add Persian foods to its menu (which presently is standard American diner fare – *see* AF 41-42) to counter a downturn in business. Employer asserted in this regard that it decided to add foreign foods to its menu because it had conferred with other restaurant operators who advised that foreign food is the future. The CO, in the Final Determination, based denial of labor certification on the conclusion that Employer's rebuttal constituted an admission that there was no present job to which a worker could be referred for employment, and on the ground that Employer had not adequately explained why a franchisee could depart from the standard menu.

The CO did not cite, and we are not aware of, a requirement that a position be in existence prior to hiring a worker qualified to fill that position as long as the employer is otherwise a viable business. In *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*), however, the Board held that it would not rule out affirming a denial of labor certification even in the absence of a fully

reasoned Final Determination if the NOF provided adequate notice, and the employer's documentation was so lacking in persuasiveness that labor certification necessarily would be precluded.[2]

Employer's assertion that it is adding Persian foods to its menu simply establishes an intent to revise its food offerings. The assertion adds little to the question of whether the position offered is properly categorized as a cooking position for which two years of experience are required. It goes to Employer's reason for establishing the position, not to reasonableness of categorizing the new position as a skilled position requiring two years of experience.

In regard to the CO's finding that Employer had failed to adequately address the question of whether a franchisee could alter a menu, we find that on the record as it was constituted at the time of the Final Determination, Employer had not clarified this point. In the request for Board review, Employer stated that it is the franchiser rather than a franchisee – impliedly asserting thereby that it had the power to change the menu as it pleased. We have carefully reviewed the evidence submitted by Employer to the local job service and to the CO, and do not find that it would have revealed Employer's status as the franchiser. Thus we affirm this aspect of the CO's Final Determination.

Even assuming arguendo that Employer's status as franchiser was revealed by the record before the CO, we still find little in Employer's documentation to support a finding that the position is properly classified under the DOT definition for "cook, specialty, foreign food." The DOT definition for that position is as follows:

> **313.361-030 COOK, SPECIALTY, FOREIGN FOOD (hotel & rest.)**
>
> Plans menus and cooks foreign-style dishes, dinners, desserts, and other foods, according to recipes: Prepares meats, soups, sauces, vegetables, and other foods prior to cooking. Seasons and cooks food according to prescribed method. Portions and garnishes food. Serves food to waiters on order. Estimates food consumption and requisitions or purchases supplies. Usually employed in restaurant specializing in foreign cuisine, such as French, Scandinavian, German, Swiss, Italian, Spanish, Hungarian, and Cantonese. May be designated according to type of food specialty prepared as Cook, Chinese-Style Food (hotel & rest.); Cook, Italian-Style Food (hotel & rest.); Cook, Kosher-Style Food (hotel & rest.); Cook, Spanish-Style Food (hotel & rest.).
> GOE: 05.10.08 STRENGTH: M GED: R3 M3 L2 SVP: 7 DLU: 77

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[2] In *Uy*, the Board observed that "[u]nder the regulatory scheme of 20 C.F.R. Part [656], rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued."

The definition states that such cooks are "[u]sually employed in restaurant specializing in foreign cuisine...." Employer's business is an American-style diner. Although we do not hold that a restaurant that offers a generalized cuisine could not employ a cook that fits this DOT definition, neither is it a foregone conclusion that any cook who is engaged in cooking a foreign cuisine is entitled to classification in this definition, which, with its two year SVP level suggests an accomplished professional cook. As noted above, the DOT must be utilized in a fashion that supports the intent of the law, and provides a flexible framework which must then be analyzed "in the context of the nature of Employer's business and the duties of the job itself." *Chams, Inc.*, 1997-INA-40, *supra*. We find that in the context of Employer's business, more is required than the mere assertion that it will now offer a line of foreign foods to justify classification of the job as a cooking position that requires two years of experience.

Finally, we observe that Employer's own description of the ease in which an offering of Persian foods could be integrated into its present operations also cuts against a finding that the position offered is the type of accomplished professional cooking described by the DOT definition for "cook, specialty, foreign food." In a letter to the state job service, Employer's rebuttal to the NOF, and the request for Board review, Employer stated the following:

> In regards to adding Persian foods to the menu, this should be a relatively easy process. Rice is a basic part of most Persian foods, and rice is used extensively in the dishes on our present menu. We are already serving Jasmine rice which is quite similar to Persian style rice. Many Persian dishes also include beef. Since we already serve a variety of beef dishes, it would require only a slight modification of our purchase and supply process. Persian soups are also meatless. Here again, any changes in our purchasing procedure would be minimal. In addition, little if any changes would be needed in our kitchen to prepare and serve Persian dishes.

Although this statement is addressed principally to kitchen process and supply, it suggests that cooking Persian foods would not be that different from cooking its other fare. Again, this does not support a finding that Employer is offering a position that requires two years of experience.

In sum, we find that Employer did not sufficiently document that it is offering a position properly classified under the DOT definition for "cook, specialty, foreign food." Accordingly, it was required to establish business necessity for its two year experience requirement. An employer can establish a business necessity by showing that (1) the requirement bears a reasonable relationship to the occupation in the context of the Employer's business; and (2) the requirement is essential to performing, in a reasonable manner, the job duties as described by the Employer. *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989)(*en banc*). The record is devoid of evidence to establish that it requires two years of experience for an individual to be able to perform, in a reasonable manner, cooking of Persian foods for an American-style diner. Accordingly, the CO correctly denied labor certification in this case.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

Entered at the direction of the panel by:

Todd R. Smyth
Secretary to the Board of Alien Labor
Certification Appeals

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.